November 15, 2016

Ms. Lizbeth Islas Plaster
City Attorney
City of Lewisville
P.O. Box 299002
Lewisville, Texas 75029-9002

Dear Ms. Plaster:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the “Act”), chapter 552 of the Government Code. Your request was assigned ID# 634522.

The City of Lewisville (the “city”) received a request for records related to a specified incident. You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have also received comments from the requestor. See Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the raised arguments and reviewed the submitted information.

Initially, the requestor argues the city failed to comply with section 552.301(e) of the Government Code with regard to a portion of its request. Pursuant to subsection 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Id. § 552.301(e). The city received the request for information on August 26, 2016. We note Labor Day was
September 5, 2016. This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body’s deadlines under the Act. Thus, the city’s fifteen-business-day deadline was September 19, 2016. The city submitted the information required by section 552.301(e) of the Government Code, including information responsive to the instant request for information, on September 8, 2016. Thus, we conclude the city complied with the requirements of section 552.301(e) of the Government Code. Accordingly, we will address the city’s arguments against disclosure of the submitted information.

Next, we note the submitted information contains the fingerprints of the requestor’s client, the public availability of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 of the Government Code provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; see id. § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure.” Id. § 560.002(1)(A). Section 560.002(1)(A) of the Government Code gives an individual or his authorized representative a right of access to his own fingerprints. The general exceptions found in the Act, such as section 552.108 of the Government Code, cannot impinge on a statutory right of access to information. See Open Records Decision Nos. 613 at 4 (1993), 451 at 4 (1986). In this instance, the requestor submits an authorization form signed by the individual whose information is at issue. Therefore, we find the requestor is acting as the authorized representative of this individual. Thus, the requestor has a right of access to his client’s fingerprints, which we have marked, pursuant to section 560.002(1)(A) of the Government Code, and such information must be released to the requestor.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. See id. §§ 552.108(a)(1), .301(e)(1)(A); see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). The city states the information at issue relates to an open and pending criminal investigation. Based upon this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. See Houston Chronicle Publ’g Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), writ ref’d n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information you have indicated.
However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in Houston Chronicle. See 531 S.W.2d at 186-88; see also Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which must be released, the city may withhold the remaining information you have indicated under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. Id. at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in Industrial Foundation. Id. at 683. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in Texas Comptroller of Public Accounts v. Attorney General of Texas, 354 S.W.3d 336 (Tex. 2010). Paxton v. City of Dallas, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.1 Texas Comptroller, 354 S.W.3d at 347-48.

Based on Texas Comptroller, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. City of Dallas, 2015 WL 3394061, at *3.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in Industrial Foundation. However, we note the requestor has a right of access to his client’s private information. See Gov’t Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person’s agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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1Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).
Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. See Gov't Code § 552.130. Upon review, we find portions of the submitted information consist of motor vehicle record information. We note section 552.130 protects personal privacy. As noted above, the requestor has a right of access to his client’s motor vehicle record information pursuant to section 552.023 of the Government Code and it may not be withheld from him under section 552.130. See id. § 552.023(a); ORD 481 at 4. Accordingly, with the exception of the information related to the requestor’s client, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.

In summary, the requestor has a right of access to his client’s fingerprints we have marked pursuant to section 560.002(1)(A) of the Government Code, and such information must be released to the requestor. With the exception of basic information, which must be released, the city may withhold the remaining information you have indicated under section 552.108(a)(1) of the Government Code. With the exception of the information related to the requestor’s client, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code. The city must release the remaining information to this requestor.

Next, the city asks this office to issue a previous determination permitting it to withhold dates of birth of members of the public under section 552.101 of the Government Code in conjunction with common-law privacy without seeking a ruling from this office. See Gov’t Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). We decline to issue such a previous determination at this time.

Finally, the city asks us to issue a previous determination permitting the city to withhold information subject to section 552.108(a)(1) of the Government Code without the necessity of requesting an attorney general opinion. See id. § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Houston Chronicle v. Mattox, 767 S.W.2d 695, 698 (Tex. 1989) (acknowledging this office has authority under section 552.301 of the Government Code to decide what constitutes a previous determination); Open Records Decision No. 673 (2001) (describing the two types of previous determinations). We note section 552.011 of the Government Code states “[t]he attorney general shall maintain uniformity in the application, operation, and interpretation” of the Act, chapter 552 of the Government Code. Gov’t Code § 552.011. Pursuant to this legislative mandate, section 552.011 grants the attorney general the authority to “prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on” the Act. Id. We further note the Act requires governmental
bodies to promptly release public information requested under the Act within a reasonable time, without delay. *Id.* § 552.221(a); Open Records Decision No. 664 at 5 (2000).

With the foregoing in mind and upon due consideration, we issue this ruling, which constitutes a previous determination allowing the city to withhold certain information under section 552.108(a)(1) of the Government Code without the necessity of first requesting an attorney general decision, so long as the city has not previously received a request for the information from the same requestor in the manner described below. *See* ORD 673. This decision is intended to encourage the prompt release of requested public information by increasing the efficiency of the review process under the Act by clearly identifying information the city may withhold under the circumstances delineated below. *See* Gov’t Code §§ 552.011, .221; Open Records Decision Nos. 684 (2009), 673.

Accordingly, the city may withhold certain information under section 552.108(a)(1) of the Government Code without the necessity of first requesting a ruling from this office in the following circumstances:

1. the city makes a good faith determination that the information at issue relates to the detection, investigation, or prosecution of crime, and the release of the information would interfere with the detection, investigation, or prosecution of an open or pending criminal matter;

2. the city will release at least the basic information about an arrested person, an arrest, or a crime (the “releasable information”) from the requested information;

3. the city will produce the releasable information to the requestor pursuant to the requirements of the Act within five business days after the date the request for information was received;

4. the city will provide the requestor with the notice included in Appendix A of this ruling when the city responds to the request pursuant to the requirements of this previous determination; and

5. the city has not previously received a request for the same information from the same requestor after the city has provided the requestor with the releasable information.

*See* Gov’t Code § 552.011. If any of the above circumstances change—or any other law, facts, or circumstances involving the requestor or the status of the requested information changes—the city may not rely upon this ruling as a previous determination to withhold the information at issue. *See* ORD 673 at 7. Additionally, the city may not rely on this previous determination in response to requests in which basic information is not responsive. For
example, no basic information is at issue in a request for only a dashboard camera video recording or 9-1-1 call audio recording. Thus, the city may not rely upon this previous determination in response to those types of requests. Furthermore, this previous determination does not apply to situations in which other law may require some or all of the information at issue to be disclosed. See, e.g., Crim. Proc. Code arts. 2.139 (detailing right of access to videos made in connection with various types of driving while intoxicated offenses), 2.29 (detailing right of access to written report to law enforcement agency of alleged violation of Penal Code section 32.51); Gov't Code §§ 411.081-.1410 (detailing rights of access to criminal history record information), 560.002(1)(A) (detailing rights of access to fingerprints and other biometric identifiers); Transp. Code §§ 550.065 (detailing rights of access to crash report forms), 724.018 (detailing right of access to blood or breath specimen analysis results). We also note this previous determination does not permit the disclosure of basic information in those instances in which the entirety of the information at issue must be withheld. See, e.g., Fam. Code §§ 58.007 (detailing circumstances under which certain information related to juvenile offenders must be withheld in its entirety), 261.201 (detailing circumstances under which certain information related to investigations of child abuse or neglect must be withheld in its entirety); Open Records Decision No. 393 (1983) (stating, because the identifying information of a sexual assault victim was inextricably intertwined with other releasable information, the governmental body was required to withhold the information in its entirety). We further note this previous determination does not permit the city to withhold citations; DIC-24 statutory warnings; DIC-25 notices of suspension; criminal trespass warnings; notices of code violations; triplicate forms; or information subject to section 552.007 or section 552.022 of the Government Code, other than information subject to section 552.022(a)(1). See Gov't Code §§ 552.007, .022(a)(1)-(18), .108(a)(1). However, the use of this previous determination does not preclude the city from withholding information pursuant to other statutory authority or previous determinations that apply to the city. See, e.g., id. §§ 552.1175(f), .130(c), .136(c), .147(b); ORD 684.

If the city's use of this previous determination does not fall within all of the circumstances delineated above, the requirements of the Act apply, including section 552.301 of the Government Code, and deadlines under the Act run from the date the city received the initial written request for information. See Gov't Code § 552.301(a); Mattox, 767 S.W.2d at 698. Consequently, misapplication of this previous determination may result in the presumption the requested information is public. See Gov't Code § 552.302. Thus, if the city is unsure as to the applicability of this previous determination to information responsive to a request for information, the city should request a ruling from this office. Additionally, this office may modify or withdraw this previous determination for any reason, including, but not limited to, misapplication of this previous determination. See id. § 552.011; Mattox, 767 S.W.2d at 698; see also Open Records Decision Nos. 485 at 3 (1987), 673 at 5. Finally, if the city later requests a ruling from this office in response to a second request for the same information from the same requestor, the city should notify this office it relied upon this previous determination in its response to the initial request.
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

[Signature]

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref:  ID# 634522

Enc.  Submitted documents

c:  Requestor
(w/o enclosures)
NOTICE:

On [date], we received your public information request for [description of information requested], dated [date request written] (the “request”). In order to promote governmental efficiency and encourage the prompt release of information, as required by the Public Information Act, we have relied upon Open Records Letter No. 2016-25470 (2016) in responding to your request. We do so within five business days of your request.

The city has made a good faith determination the information you requested:

- deals with the detection, investigation, or prosecution of crime and the release of the records would interfere with the detection, investigation, or prosecution of an open or pending criminal matter.

This information is subject to section 552.108(a)(1) of the Government Code. The city has also determined you have not previously requested this information. Therefore, pursuant to the previous determination granted by the Office of the Attorney General in Open Records Letter No. 2016-25470, the city is releasing some information to you, and is withholding the remaining responsive information subject to section 552.108(a)(1) of the Government Code.

Please note, we are withholding the following specified types of information:

- Incident report (except basic information)
- Witness/suspect interview(s)
- Video recording(s)
- Audio recording(s)
- Other: (specify documents withheld)

If you have questions regarding the use of this previous determination, please call the city at XXX-XXX-XXXX, or for more information concerning your rights and the responsibilities of the city, please visit the Office of the Attorney General’s website at https://www.texasattorneygeneral.gov/og/information-about-552.108a1-previous-determinations, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. You may also review general information about the Public Information Act, including the types of information included in basic information, in the 2016 Public Information Handbook at http://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.

1 If you request this information a second time, the city must request a ruling from the Office of the Attorney General (the “OAG”) in order to withhold the information. See Open Records Letter No. 2016-25470.